No. 11,307

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TONY LEGATOS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
EMMET J. SEAWELL,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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STATEMENT OF THE CASE.

The facts in this case as developed by the testimony are as follows: The appellant owns some sixteen or seventeen restaurants and bars in and around the City of Sacramento, including the Golden Tavern Bar located at 621 "K" Street, Sacramento. (See Printed Record, pages 35, 205.)

On the morning of July 18, 1945, at approximately 10:00 A.M. two inspectors from the Alcohol Tax Unit, Internal Revenue Service, Treasury Department, visited the premises of the Golden Tavern Bar for the purpose of making a routine inspection. When the inspectors entered the bar the doors were open and there were a number of people sitting in the bar drinking. The inspectors approached the bartender

on duty, one Tommie O'Leary and presented their official credentials. The inspectors then proceeded back of the bar and removed therefrom approximately forty bottles of liquor which they took to a rear booth in the establishment for inspection. The inspectors then tested the various bottles in order to ascertain if the bottles contained the ingredients which the labels on the outside of the bottles alleged them to contain. The test that the inspectors used is known as the Williams Alcohol Test. The inspectors had what is known as a Williams Test Set with them which came from the chemical laboratory of the Bureau of Internal Revenue, San Francisco, California,

At approximately 10:20 A.M. while the inspectors were making their tests of the contents of the bottles in question, one Mr. Nick Tiodoritus, came into the bar. Mr. Tiodoritus was later identified as an employee of appellant. No one at any time made any objection whatsoever to the inspection being conducted by the inspectors. After the inspectors had completed their tests they removed thirty-one bottles and their contents from the premises, and these thirty-one bottles and contents were introduced into evidence as Government exhibits Nos. 1-31 inclusive.

After the inspectors seized the bottles in question they were turned over to Dr. R. F. Love who has been a chemist with the Internal Revenue Bureau for the past twenty-seven years. Dr. Love testified that he made an examination of the contents of the government exhibits Nos. 1-31 inclusive, and found that each and every bottle contained a substance

other than that indicated by the labels on the bottles, in other words, that the bottles had all been refilled. (R. pages 114 to 168, inclusive.)

The defendant was indicted in an indictment containing two counts, for refilling and reusing liquor bottles, the first count being based on Section 2871 and the second count on Section 2803, Internal Revenue Code. Section 2871 makes knowledge and wilfulness an element of the crime, but Section 2803 does not. The Court gave a general instruction, applicable to both counts, that the case was one in which it was not necessary to prove guilty intent, but that the offense was committed in that the defendant or his employees refilled and reused bottles, whether wilfully and knowingly done or not. The instruction as given was based on the case of *United States v. Guthrie,* 171 Fed. 528. We submit that the instruction was proper with respect to Section 2803, since it makes no reference to the act being knowingly and wilfully done. However, the defendant was acquitted on that count. The instruction is attacked with respect to the first count, on which the defendant was convicted, because Section 2871, on which the count was based, makes knowledge and wilfulness essential elements of the crime.

ARGUMENT.

There appears to be no doubt from the evidence that the acts of the employees were wilfully and knowingly done. It might be argued that these acts were the acts of the appellant and that therefore he was not preju-

diced by the instructions. The appellant contends that under the evidence in the case these acts cannot be imputed to him in a criminal prosecution. This is true, at least with respect to an offense involving moral turpitude. The question is whether it applies to the statute here involved which is designed to protect the revenue and control the liquor traffic. A statute may denounce acts not in themselves wrong. In *United States v. Illinois Central R. Co.,* 303 U. S. 239, which cites *United States v. Murdock,* 209 U. S. 389, referred to on page 56 of the appellant's brief, the Court pointed out that with respect to statutes denouncing offenses of the nature here involved "wilfully" may mean "conduct marked by careless disregard whether or not one has the right so to act". It may mean plain indifference to the requirements of the statute. In that case the railroad company, although it made every effort to comply with the requirements of the 28-Hour Law, was held responsible for the negligence of its employees. It may be said that the railroad company, being a corporation, could act only through employees. The same is more or less true here. The defendant operated a number of taverns and had to conduct his business through employees. The material evidence against the defendant is that he gave instructions to his employees to push the sale of rum. This they did by using it in refilling bottles. In this sense he was responsible for their acts, which were wilfully done. In view of the nature of the business in which he was engaged, it was his duty, as pointed out in the *Guthrie* case, supra,

page 531, to see that the business was legally conducted. He, at least, profited by the violation.

The *Illinois Central* case, supra, was followed in *Arrow Distilleries, Inc. v. Alexander,* 109 F. (2d) 397, 406 (CCA 7th), a case involving a violation of the Federal Alcohol Administration Act, in which the Court pointed out that the purpose of the statute is material in the determination of the meaning of the word "wilfully".

The recent case of *Meyer Eastman, et al. v. United States,* 153 F. (2d) 80 (CCA 8th), in which the defendants were convicted of carrying on the business of wholesalers without complying with the Federal Alcohol Administration Act and the internal revenue laws, is not greatly unlike the case before this Court.

CONCLUSION.

We respectfully submit that the judgment be affirmed.

Dated, San Francisco, California,
May 7, 1947.

FRANK J. HENNESSY,
United States Attorney,
EMMET J. SEAWELL,
Assistant United States Attorney,
Attorneys for Appellee.